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Supreme Court of

OCTOBER

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COUNTY OF ORANG

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TERM, 1986

VINE, *Petitioner,*

et al., Respondents.

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OURT OF APPEALS
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QUESTION PRESENTED

Whether the Ninth Circuit erred in ruling that the petitioner City of Irvine's Motion to Intervene in this case was untimely when the Motion was filed one month after Irvine learned that its interests were no longer represented herein and nearly three months before the proposed settlement of the case was submitted to the District Court.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, City of Irvine ("Irvine"), and the Respondents, County of Orange ("County"), Air California, American Airlines, America West Airlines, Continental Airlines, Inc., Frontier Airlines, Inc., Jet America, Pacific Southwest Airlines, Republic Airlines, Inc., Western Airlines, Inc., Alaska Airlines, Inc., Muse Air Corporation, Trans World Airlines, Inc., United Airlines, Inc., Federal Aviation Administration ("FAA"), McDonnell Douglas Corporation, City of Newport Beach ("Newport"), Stop Polluting Our Newport Corporation ("SPON"), and Airport Working Group of Orange County, Inc. ("AWG").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF IRVINE,

Petitioner,

v.

COUNTY OF ORANGE,
AIR CALIFORNIA, AMERICAN AIRLINES,
AMERICA WEST AIRLINES, CONTINENTAL AIRLINES, INC.,
FRONTIER AIRLINES, INC., JET AMERICA,
PACIFIC SOUTHWEST AIRLINES, REPUBLIC AIRLINES, INC.,
WESTERN AIRLINES, INC., ALASKA AIRLINES, INC.,
MUSE AIR CORPORATION, TRANS WORLD AIRLINES, INC.,
UNITED AIRLINES, INC., FEDERAL AVIATION ADMINISTRATION,
MCDONNELL DOUGLAS CORPORATION,
CITY OF NEWPORT BEACH,
STOP POLLUTING OUR NEWPORT CORPORATION,
AIRPORT WORKING GROUP OF ORANGE COUNTY, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The City of Irvine, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 9, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is reported at 799 F.2d 535 (9th Cir. 1986). The United States District Court for the Central District of California (Hatter, D.J.) denied the City of Irvine's motion to intervene on October 21, 1985.

JURISDICTION

Invoking federal jursidiction under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1337, the petitioner brought this suit in the Central District of California. The respondent County of Orange also invoked the pendent and ancillary jurisdiction of the District Court with respect to related state law claims under the California Environmental Quality Act (Public Resources Code §§ 21000 *et seq.*) and the implementing California State CEQA regulations and guidelines (14 Cal. Admin. Code §§ 15000 *et seq.*).

Petitioner invoked the jurisdiction of the Court of Appeals for the Ninth Circuit under 28 U.S.C. Section 1291. The Ninth Circuit's opinion affirming the Central District's decision was filed on September 9, 1986. Petitioner's petition for rehearing in the Ninth Circuit was denied on or about November 4, 1986.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Fed. R. Civ. Proc., Rule 24, states as follows:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . .

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application, anyone may be permitted to intervene in an action. . . .

> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . .

In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

STATEMENT OF THE CASE

I.

JURISDICTION AND THE DISPOSITION BELOW

Jurisdiction of the District Court was invoked under 28 U.S.C. Section 1331 based upon a civil action arising under the Constitution and the laws of the United States and under 28 U.S.C. Section 1337 because the action arose under acts of Congress regulating commerce.

In addition thereto, respondent, County, invoked the pendent and ancillary jurisdiction of the District Court with respect to related state law claims under the California Environmental Quality Act (Public Resources Code Sections 21000 *et seq.*), and the implementing California State CEQA regulations and guidelines, 14 Cal. Admin. Code Sections 15000 *et seq.* (the "Guidelines").

The County also invoked the District Court's ancillary jurisdiction over the aforementioned state law claims because they are related to and affected by the federal issues in the Complaint.

II.

STATEMENT OF FACTS

The County is the proprietor of John Wayne Airport ("JWA"), the only commercial air carrier airport in Orange County. (CR 1, pp. 1, 8; CR 7, pp. 1, 8; AER, pp. 2, 9, 34, 41.)

On February 26, 1985, the County approved and adopted the Airport Project, its plan for the future development of commercial airline activity at JWA. Among other things, the Airport Project proposed limitations on the number and type of commercial jet aircraft which could utilize JWA, limitations on the maximum number of commercial aircraft passengers utilizing the airport, and a square footage limitation on JWA's terminal size. Significantly, the Airport Project did not address or alter the County's historic opposition to commercial use of the El Toro Marine Corps Air Station ("El Toro MCAS"), which is located southeast of JWA, adjacent to Irvine. (CR 125, p. 2; AER, p. 80.)

Petitioner, Irvine, is bordered to the south and east by the El Toro MCAS. Since approximately 1942, El Toro MCAS has been, and continues to be, operated solely as a military air base. Until recently, the County has continually expressed its opposi-

tion to utilization of El Toro MCAS for anything other than a military air base, and such utilization of the El Toro MCAS was neither proposed nor discussed.

In fact, prior to adoption of the Airport Project, the County was on record, via resolutions of its Board of Supervisors and the adoption of its General Plan, as opposing any commercial use of El Toro MCAS. Both Irvine's and the County's General Plan recognize El Toro MCAS as being within Irvine's "sphere of influence." (CR 125, p. 26; AER, p. 104.)

Both Irvine's and the County's vehement opposition to any civilian use of El Toro MCAS was well acknowledged and recognized via County Resolutions. On or about October 12, 1982, the County had adopted Resolution No. 82-1542 which, among other things, recognized that: (a) planning and development of land uses and infrastructure facilities surrounding El Toro MCAS assumed continued military use; (b) the establishment of a commercial airport at El Toro MCAS would cause severe environmental impacts on South Orange County and Irvine; and (c) joint civilian and military use of El Toro MCAS would require existing residential neighborhoods to be converted to other land uses. (CR 125, p. 26; AER, p. 104.)

County Resolution No. 82-1542 also reaffirmed the County's historic opposition to commercial airline use of El Toro MCAS, which opposition had previously been expressed by way of Resolution No. 80-215 dated February 6, 1980, and reassured Irvine and its residents of the County's long-standing and abiding commitment to oppose joint civilian and military use of El Toro MCAS. (CR 125, p. 26; AER, p. 104.)

Consistent with Resolution No. 82-1542, Irvine's General Plan assumed that El Toro MCAS would continue as military use only. Specifically, Irvine's land use element, which includes within its parameters the unincorporated area adjacent to El Toro MCAS, as well as the areas currently within the City of Irvine bordering the military air base, and the noise elements of the General Plan, rely heavily upon this assumption. (CR 125,

pp. 26-27; AER, pp. 104-105.) The General Plan of Orange County also assumes that El Toro MCAS would remain in government use throughout the period of the Plan (the year 2005).

Prior to adoption of the Airport Project, and pursuant to the requirements of the California Environmental Quality Act (California Public Resources Code Section 21000, *et seq.*) and the National Environmental Policy Act (42 U.S.C. Section 4321, *et seq.*), a study was prepared by the County and Federal Aviation Administration concerning the proposed environmental effects of the Airport Project. This study has been designated by the County as Environmental Impact Report 508 and Environmental Impact Statement 508 (hereinafter referred to as "EIR 508/EIS"). (CR 1, pp. 14-17; CR 7, pp. 14-17; AER, pp. 15-18, 47-50.)

After adopting the Airport Project, and in anticipation of various legal actions which would be taken against the County challenging the Project and adequacy of EIR 508/EIS, the County, on March 6, 1985, filed this action naming as defendants various airlines, community groups and others which the County recognized to be interested in the resolution of the proposed Airport Project. This action sought, among other things, a declaratory judgment as to the lawfulness and adequacy of the Airport Project and the studies relied upon for its implementation. (CR 1, pp. 27-29; CR 7, pp. 28-41; AER, pp. 28-30, 61-64.)

Also named as defendants were "Doe Defendants 1 through 1,000," alleged by the County to be "persons interested in the subject matter of this action, in whole or in part, and who take positions in respect of one or more of the controversies alleged in this complaint contrary and adverse to the positions of the plaintiff." (CR1, pp. 7-8; CR7, p. 8; AER, pp. 8-9, 41.)

At the inception of this litigation, the Airport Project and lawsuit focused exclusively on the proposed expansion of JWA, and the caps and limitations which the County sought to impose

on the air carrier use of JWA. Although JWA is located in unincorporated County territory adjacent to the City of Irvine, the County did not join Irvine as a defendant.

The County expressly alleged that the action was brought "to afford all interested and affected parties an opportunity to litigate their respective and related claims in a single forum." (CR 1, p. 1; CR 7, p. 2; AER, pp. 2, 35.) In so doing, the County named as defendants the FAA, various airlines who currently serve, or have expressed an interest in serving, travelers utilizing JWA, Newport, located adjacent to JWA, groups purporting to represent citizens residing in Newport, and various organizations generally opposed to any increase in operations at JWA, and a corporation engaging in the manufacture and sale of commercial aircraft. (CR 1, pp. 3-7; CR 7, pp. 3-8; AER, pp. 3-8, 36-41.)

At the time the County filed its complaint, Irvine, as a municipality contiguous to JWA, had an interest in promoting and protecting certain of the issues raised therein. Because the litigation and underlying EIR 508/EIS were solely involved with the proposed expansion and limitations on air carrier traffic at JWA, Irvine's interests were adequately represented by certain of the parties named as defendants, including Newport, the FAA and citizens groups.

On or about August 20, 1985, Irvine first became aware of the existence of a settlement proposed by certain parties to this litigation (the "Settlement Agreement"). (CR 125, p. 27; AER, p. 105.) The Settlement Agreement contemplates both military and civilian use of El Toro MCAS, which joint use would have a significant and adverse impact on the planning, development and environment of the City of Irvine. (CR 125, p. 26; AER, p. 104.)

The terms of the Stipulated Judgment[1] dramatically alter the scope of the Airport Project, the County's position with respect to the commercial use of El Toro MCAS, and the position of the settling defendants with respect to the adequacy of EIR 508/EIS.

Specifically, the terms of the Settlement: (a) more severely restrict the growth of JWA from that set forth in the Airport Project; (b) recognize that JWA will not satisfy the demand for air travel in Orange County with the limitations set forth in the Airport Project and the Settlement: (c) recognize that in consideration for the settling parties' execution of the Settlement, the County would implement Resolution No. 85-1231, which rescinded the County's opposition to commercial use of El Toro MCAS; (d) impose a duty on the County to cooperate with third parties seeking assistance in obtaining federal funds in establishing other commercial airport operations in Orange County; (e) terminate the ability of the settling defendants to litigate the adequacy of EIR 508/EIS as it relates to the Airport Project and the amendments to the Airport Project resulting from the Proposed Settlement; and (f) require that a judgment be entered by the Court establishing the adequacy of EIR 508/EIS with respect to the Airport Project, and the amendments thereto resulting from the Settlement. (CR 175; AER, pp. 504-526.)

As a result of the Settlement and Resolution No. 85-1231, the County will now sanction, assist and promote the development of El Toro MCAS as a commercial airport. The Settlement, by way of the Stipulated Judgment, will, without Irvine's intervention, forever bar Irvine or any other party from attacking the adequacy of the EIR 508/EIS or the Airport

[1] The Settlement was first filed with the District Court on December 13, 1985, approximately seven weeks after Irvine's Motion For Leave to Intervene was denied by the trial court. (CR 175; AER, pp. 504-526.) The District Court entered the "Stipulation for Entry of Judgment by Certain Settling Parties" on December 13, 1985. (CR 176; AER, pp. 527-530.)

Project. Not only has the potential impact of the Airport Project on Irvine substantially increased, but no party remains to protect or represent Irvine's interest in challenging the adequacy of EIR 508/EIS.

On September 20, 1985, months before the Settlement Agreement was submitted for court approval, Irvine filed its Motion For Leave To Intervene pursuant to Fed. R. Civ. P. 24(a) and (b). (CR 126; AER, pp. 70-76.) The motion was opposed by defendants Newport, SPON, AWG, Pacific Southwest Airlines, and America West Airlines. (CR 140, 141, and 143; AER, pp. 252-333, 334-383, 384-390; CR 149; AER, pp. 398-406.)

Prior to being apprised of the proposed Settlement Agreement, Irvine's interests were being represented adequately by other parties herein. Until it became cognizant of the proposed Settlement Agreement, Irvine had no compelling reason to intervene in the within action. Recognizing its status as the municipal entity to be most affected by the proposed Settlement Agreement, Irvine promptly moved to intervene so as to adequately protect its rights and interests. Irvine's motion was argued on October 21, 1985, and the District Court entered its final order denying the application to intervene on October 28, 1985. (CR 153, 154; AER, pp. 435-441, 442-443.)

On December 13, 1985, nearly three months after Irvine filed its motion, the proposed Settlement was finally submitted to the District Court in the form of a "Stipulation for Entry of Judgment by Certain Settling Parties." (CR 175; AER, pp. 504-526.) On December 13, 1985, the District Court entered a judgment in accordance with the Stipulation. (CR 176; AER, pp. 527-530.) The Ninth Circuit affirmed on September 9, 1986. Petitioner's petition for rehearing in the Ninth Circuit was denied on or about November 4, 1986.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW THAT IRVINE'S MOTION TO INTERVENE WAS UNTIMELY RAISES IMPORTANT AND UNRESOLVED FEDERAL PROBLEMS.

The Ninth Circuit held below that Irvine's motion for intervention as a matter of right and permissively was untimely, thereby affirming the decision of the District Court denying the motion. This raises serious, special and important federal issues with respect to the statutory construction and application of Fed. R. Civ. Proc., Rule 24, the federal intervention statute, which should be resolved by this Court.

U.S. Sup. Ct. Rule 17, 28 U.S.C.A. recognizes this Court's power of supervision over the federal Courts of Appeals. This power of supervision has been exercised to review the construction and application of various of the federal rules of civil procedure. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947) ("Case present[ing] an important problem under Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c"); *Schlagenhauf v. Holder*, 379 U.S. 104, 109, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964) ("case involv[ing] the validity and construction of Rule 35(a) of the Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action").

The instant matter involves a major dispute with respect to the timeliness of Irvine's motion to intervene pursuant to Fed. R. Civ. Proc., Rule 24. In essence, Irvine contends that the District Court and the Ninth Circuit erroneously interpreted and applied Fed. R. Civ. Proc., Rule 24, in ruling that Irvine's Motion to Intervene in this case was untimely although it was filed one month after the existence of the Settlement Agreement, and nearly three months before the Settlement Agreement was submitted to the District Court in the form of the

Stipulation. Since the determination of the proper construction and application of a federal rule of civil procedure is involved, this Court may exercise its supervisory powers over the decisions below thereon. Further, as will be shown hereinafter, the decisions of the District Court and the Ninth Circuit were erroneous. Therefore, this Court should exercise its powers to review the instant matter through the issuance of a writ of certiorari.

In addition, this Court should exercise its power of review by issuing a writ of certiorari because the construction and application of Fed. R. Civ. Proc., Rule 24, herein will affect the disposition of public lands. In *United States v. Coleman*, 390 U.S. 599, 88 S. Ct. 1327, 20 L.Ed.2d 170 (1968), this Court granted certiorari to determine whether certain quartzite deposits upon public lands for which the respondent had applied for a patent based on his entry onto and exploration of said lands constituted a "common variety" of stone under 30 U.S.C. Section 611. This Court stated that it "granted the Government's petition for a writ of certiorari because of the importance of the decision to the utilization of public lands." *Id.* at p. 601. *See also, Andrus v. Utah*, 446 U.S. 500, 506, 100 S. Ct. 1803, 64 L.Ed.2d 458 (1980) (certiorari granted to resolve "a significant issue regarding the disposition of vast amounts of public land").

Similarly, this matter involves the disposition of federal lands, namely, the El Toro MCAS. Therefore, the ultimate determination of the issue of Irvine's timeliness under Fed. R. Civ. Proc., Rule 24, necessarily will have a strategic impact on the utilization of those public lands. Consequently, Irvine respectfully requests that the Court grant this petition for a writ of certiorari.

The need for review by this Court on a writ of certiorari is augmented by the sheer importance of the disposition of this case not only to the parties in particular, but to Southern California generally. Because of Irvine's proximity to JWA and

to El Toro MCAS and the obvious environmental interests impacted by the proposed future growth of JWA and El Toro MCAS contemplated under the proposed Settlement of the case into which Irvine seeks to intervene, Irvine's interest in a proper determination of its right to intervene is substantial and indisputable. Moreover, as stated above, Irvine's land use element, as well as the noise elements of Irvine's General Plan, rely heavily on the assumption that El Toro MCAS would continue as military use only. An erroneous decision below would thus affect, at the very least, those members of the Irvine and South Orange County communities who have relied on these elements and/or on the County's historic opposition to commercial use of El Toro MCAS.

It is beyond dispute that Irvine has a substantial interest in the remedial scheme envisioned by the proposed Settlement. This interest is prejudiced by the potential *stare decisis* impact which the Stipulated Judgment and Settlement will have upon Irvine. In a similar case, *United States v. Stringfellow, et al.*, 783 F.2d 821 (9th Cir. 1986), the intervenor ("CNA") appealed a denial of its motion to intervene under Fed. R. Civ. Proc. 24(a). CNA had filed its motion to intervene approximately three months after the complaint had been filed. The trial court's denial of intervention under Fed. R. Civ. Proc., Rule 24(a) was reversed on appeal because of the "substantial interest" the intervenor established in the contemplated settlement and remedial scheme.

On appeal, the Ninth Circuit found that the mere potential *stare decisis* impact of the litigation could, as a practical matter, result in the intervenor being precluded from litigating several of its claims against other parties to the action. The *Stringfellow* court also determined that the ultimate disposition or settlement of the litigation would establish a remedial scheme, in which CNA had a palpable interest. Thus, the Ninth Circuit stated as follows:

> "The disposition of the present litigation will, as a practical matter establish the applicable remedial

> scheme. CNA has a palpable interest in that scheme. Where, as here, a prospective intervenor has demonstrated a clear interest in the remedial scheme, and where the prospective intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is reasonable to conclude that disposition of the litigation may impair the prospective intervenor's ability to protect its interest. That the remedy established in the present litigation may be challenged in a subsequent action does not detract from our conclusion . . .
>
> "Because of the possible *stare decisis* effect of this litigation and because of CNA's palpable interest in the remedial scheme, we hold that CNA has adequately demonstrated that the disposition of the litigation may, as a practical matter, impair its ability to protect its interests." (*Id.*, at p. 827.)

As in *Stringfellow*, Irvine, because denied intervention, was not able to participate in the remedial scheme envisioned by the proposed Settlement. Irvine's interests clearly differed from those of the parties to the Settlement in that Irvine contests the adequacy of the EIR 508/EIS statements. The remaining non-settling defendants have not—and cannot—maintain any claims with respect to the environmental impact reports. As a result of the Settlement, Irvine's interests in the environmental impact have not been addressed, much less protected.

Finally, the Stipulated Judgment indeed has a *stare decisis* impact on Irvine in that Irvine will be bound by the adequacy of the disputed environmental impact statements. No party remains in this case who has standing to dispute the environmental impact reports. Moreover, the applicable limitation period has expired, thereby barring Irvine and any other party from bringing a separate action to litigate the adequacy of said reports. Because of the importance of the disposition of

this case to Irvine and the communities in Southern California generally, the Court should grant this Petition and review the instant matter.

This Court has found "special and important reasons," thereby granting a petition for a writ of certiorari, where many individuals are involved or are affected by the decision below. *Patterson v. Lamb*, 329 U.S. 539, 67 S. Ct. 448, 91 L.Ed. 485 (1947); *Federal Trade Commission v. Jantzen, Inc.*, 386 U.S. 228, 229, 87 S. Ct. 998, 999, 18 L.Ed.2d 11, 13 (1967); *United Steelworkers v. Usery*, 429 U.S. 305, 307, 97 S. Ct. 611, 613, 50 L.Ed.2d 502, 506 (1977).

As shown above, the impact of the decision with respect to the timeliness of Irvine's motion to intervene will have a severe impact on, at the very least, the South Orange County area population of California. In light of the significant impact which the disposition of this case will have upon numerous entities and individuals not previously represented herein, this Court should grant Irvine's petition for a writ of certiorari and review the decision of the Ninth Circuit.

This Court also has granted petitions for a writ of certiorari where especially large amounts of money are involved in litigation over the issue of statutory construction. *See, United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2950, 77 L.Ed.2d 580, 211, n.7 (1983); *Commissioner v. Standard Life & Accident Insurance Company*, 433 U.S. 148, 77 S. Ct. 2523, 53 L.Ed.2d 653 (1977); *Alaska v. American Can Co.*, 358 U.S. 224, 79 S. Ct. 274, 3 L.Ed.2d 257 (1959); *Andrus v. Utah, supra*, at U.S. 506.

As stated, the determination of this case will have a significant fiscal impact upon not only the Petitioner and the Respondents, but upon other members of the South Orange County community who have chosen to rely on the County's historic opposition to commercial use of El Toro MCAS. The case also raises significant questions pertaining to the proper interpretation and application of the timeliness requirement of

the federal intervention statute upon which this Court should provide guidance. Finally, as will be shown hereinafter, the decision below conflicts with decisions of other circuits and was erroneous and inequitable.

II.

THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE TIMELINESS REQUIREMENTS ON A MOTION TO INTERVENE.

U.S. Sup. Ct. Rule 17, 28 U.S.C.A., which sets forth considerations governing review on certiorari, states that one reason that will be considered in determining whether to grant review on writ of certiorari is whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . ." *See also, Bingler v. Johnson*, 394 U.S. 741, 59 S. Ct. 1439, 22 L.Ed.2d 695 (1969); *U.S. v. O'Malley*, 383 U.S. 627, 86 S. Ct. 1123, 16 L.Ed.2d 145 (1966). As shown below, such a conflict exists with respect to the requirement of timeliness in filing a motion to intervene under Fed. R. Civ. Proc., Rule 24, the federal intervention statute. Therefore, this Court should grant Irvine's petition for a writ of certiorari to harmonize the decisions of the various circuit courts.

As shown hereinafter, the Ninth Circuit test for determining timeliness is set forth in *United States v. State of Oregon*, 745 F.2d 550 (9th Cir. 1984). In *Oregon*, the Ninth Circuit stated that timeliness is determined by considering three factors: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. (*Id.*, at p. 552.)

On the other hand, the test for determining timeliness of a motion to intervene utilized in other circuits is quite different

than the Ninth Circuit test set forth above. For example, the Eleventh Circuit test, as articulated in *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), is as follows:

> "A district court must consider four factors in assessing timeliness, namely (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely." (*Id.*, at p. 1516.)

Thus, a clear conflict exists between the test for determining the timeliness of a motion to intervene utilized in the Ninth Circuit and the timeliness test utilized by the Eleventh Circuit. Specifically, the Ninth Circuit timeliness test fails to consider in any manner the third factor set forth in the Eleventh Circuit test: the extent of prejudice to the would-be intervenor if his petition is denied.

Not only is the Ninth Circuit test for determining the timeliness of a motion to intervene in conflict with the decisions of the Eleventh Circuit, it is in conflict with the decisions of other circuits. *See, United Nuclear Corp. v. Cannon*, 696 F.2d 141 (1st Cir. 1982), *Culbreath v. Dukakis*, 630 F.2d 15, 20-25 (1st Cir. 1980) (First Circuit test uses same factors utilized by the Eleventh Circuit); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) (Fifth Circuit test uses same factors utilized by the Eleventh Circuit).

As shown above, the denial of Irvine's motion to intervene will severely prejudice Irvine and its citizens. As stated, Irvine's General Plan and land use element assumed that El Toro

MCAS would continue as military use only. Consequently, future planning and development of Irvine will be severely affected by the disposition of Irvine's motion to intervene. Moreover, because El Toro MCAS is adjacent to Irvine and is within Irvine's sphere of influence, denial of Irvine's motion raises serious questions about the ability of Irvine to participate in democratic self-planning.

Since Irvine will suffer great prejudice if its petition is denied, the determination of the timeliness of its motion to intervene would have been different under the timeliness test utilized by other circuits. Thus, this Court is presented with a conflict between circuits with respect to the factors considered in determining the timeliness of a motion to intervene. Therefore, this Court should exercise its discretion and review this matter upon writ of certiorari.

III.

THE DECISION BELOW THAT IRVINE'S MOTION TO INTERVENE WAS UNTIMELY WAS ERRONEOUS AND INEQUITABLE.

The Ninth Circuit's finding that Irvine failed to intervene on a timely basis was clearly erroneous and an abuse of discretion insofar as the Ninth Circuit clearly ignored the changed circumstances established by Irvine in the District Court and apposite case authority affirmatively establishing that Irvine's motion was timely.

In determining whether a motion for intervention is timely, the Court must look to "all of the circumstances." *NAACP v. New York*, 413 U.S. 345, 93 S. Ct. 2591, 37 L.Ed.2d 648 (1973). In analyzing the timeliness element, the most relevant circumstance "is when the intervenor became aware that its interest would no longer be protected adequately by the parties." *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 8 (9th Cir. 1980), citing *United Airlines, Inc. v.*

McDonald, 432 U.S. 385, 97 S. Ct. 2464, 53 L.Ed.2d 423 (1977). As will be demonstrated herein, under the Ninth Circuit's decisions, Irvine's motion was timely, as it was made immediately after it discovered that "its interest would no longer be protected adequately by the parties."

The critical circumstance for determining timeliness in the instant case is that on about August 20, 1985, Irvine first became aware of the possibility of Settlement. (CR 125, p. 27; AER, p. 105.)

Prior to this date, Irvine's only interest in this litigation was having the District Court take note of the affirmative defenses and/or claims concerning the County's request for a declaratory judgment as to the adequacy of EIR 508/EIS, and its right to implement the Airport Project. Irvine's interests were, however, adequately represented by other parties herein, namely, Newport, the FAA and the citizens groups.

Indeed, prior to publication of articles concerning the proposed Settlement in the local media, it would have been sheer speculation for Irvine to assume that any settlement terms would be acceptable to all the parties, or harmful to Irvine, much less divine the specific settlement terms through oblique and often inaccurate newspaper accounts of the "settlement discussions."

Even under the Ninth Circuit's test for "timeliness," Irvine's application should have been granted. The pendency of the proposed Settlement clearly constituted a changed circumstance, insofar as it opened up the possibility of new and expanded negotiations regarding the utilization of El Toro MCAS as an alternative to JWA. Prior to that date, the Airport Project litigation, for all practical purposes, merely involved proposals relating to JWA. By injecting into the proposed Settlement terms that directly impacted on the utilization of the El Toro MCAS (within the City of Irvine's sphere of influence) and proposed expansion of air operations at the air base, the settling parties, at the eleventh hour, themselves transformed the nature and character of the Airport Project litigation.

Neither the settling parties nor the District Court could conceivably have expected Irvine to anticipate such a rapid turn of events at the outset of the Airport Project litigation. Irvine filed its Motion to Intervene approximately one month after it learned of the proposed Settlement and the proposed terms thereof that directly impacted on the utilization of the El Toro MCAS. In order for Irvine's motion to have been timely under the decisions of the District Court and the Ninth Circuit below, it would have been incumbent upon Irvine to know the unknowable in advance, *i.e.*, that the parties to this action had proposed settlement terms that affected the utilization of El Toro MCAS. As Irvine sought leave to intervene shortly after being apprised of these changed circumstances, Irvine's motion was timely.

The test for determining whether a motion for intervention is timely is set forth in *Legal Aid Society of Alameda County v. Dunlop,* 618 f.2d 48 (9th Cir. 1980), wherein the court held:

> "[T]he relevant circumstances here for determining timeliness is when the intervenor became aware that its interests would no longer be protected adequately by the parties: this was the precise issue decided in *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394, 97 S. Ct. 2464, 2469, 53 L.Ed.2d 423 (1977)." *Id.*, at p. 50.

In *McDonald,* the Supreme Court ruled that a party who had been a member of a plaintiff class was entitled to intervene to appeal the District Court's ruling striking the complaint's class allegations, which ruling was made some four years earlier. Intervention was allowed because the intervenor learned only at that late date that the remaining defendants would not bring an appeal upon final resolution of the matter in the District Court.

In permitting intervention, this Court expressly found that the critical factor in determining timeliness was the point in time the would-be intervenor learned its interests were no

longer being adequately protected by the parties to the action. Thus, the Supreme Court set a standard recognized by the Ninth Circuit in *Dunlop*, requiring that the timeliness of a motion for intervention be considered from the point in time at which the intervenor's interests were no longer adequately represented.

Further, in analyzing the timeliness requirement, a court must consider when the applicant could have intervened, and weigh the lapse of time in light of the circumstances of the case. As stated by a federal commentator:

> "In the exercise of its discretion the court of course will consider the time element itself but this should not be judged in a vacuum. The requirement of timeliness is not a means of punishment for the dilatory and the mere lapse of time by itself does not make an application untimely. The court must consider whether the applicant was in a position to seek intervention at an earlier stage in the case and must weigh the lapse of time in the light of all the circumstances of the case." 7A C. Wright and A. Miller, *Federal Practice and Procedure*. § 1916 at p. 574 (1972). *See also, United States v. State of Oregon*, 745 F.2d 550 (9th Cir. 1984).

Petitioner submits that the case of *United States v. State of Oregon, supra*, is dispositive on this issue.

In *Oregon*, the State of Idaho moved for leave to intervene to participate in negotiations for a modified management plan relating to intra-state fishing rights in the Columbia River and its tributaries. The motion for leave to intervene was filed *fifteen* years after the commencement of litigation, and six years after all parties to the litigation signed a plan to manage the fisheries which was subsequently approved by the District Court.

Approximately six years thereafter, when it became apparent that certain of the signatories to the management plan were

withdrawing and the plan would be renegotiated, Idaho moved for leave to intervene, citing changed circumstances. The District Court denied the motion, claiming that Idaho had failed to meet the timeliness requirement of Fed. R. Civ. P. 24(a)(2).

In reversing the decision, the Ninth Circuit noted:

> "In determining timeliness, this court has stated that it looks to three factors: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. [Citations omitted.] Mere lapse of time alone is not determinative. [Citation omitted.] Idaho gives changed circumstances—the possibility of new and expanded negotiations—as a major reason for its attempted intervention at this time. This change of circumstance, which suggests that the litigation is entering a new stage, indicates that the stage of the proceeding and reason for delay are factors which militate in favor of granting the application. [Citations omitted.]." (*Id.*, at p. 552.)

The Ninth Circuit's rationale in *Oregon* is equally persuasive herein. Because the terms of the settlement and resolutions contemplated therein clearly constituted a changed circumstance and a new stage of the litigation, Irvine's request to intervene was timely and should have been so recognized by the District Court and the Ninth Circuit.

The District Court's finding that Irvine's intervention would prejudice the settling parties (RT, p. 41; AER, p. 488), which was affirmed by the Ninth Circuit, also clearly constituted an abuse of discretion and was unsupported by the record. It was not until September 6, 1985 that the settling parties affixed their signatures to the "Stipulation for Entry of Final Judgment By Settling Parties." More significantly, the Settlement Agreement had not even been submitted for court approval at the time the motion was argued. (CR 125; CR 175;

CR 176; AER, pp. 142, 504-526, 527-530.) Thus, any delay between the time Irvine first learned of the proposed settlement and the time it filed the instant motion—approximately four weeks—did not cause any palpable prejudice to the parties herein. Indeed, at the time the motion was argued, respondents' conclusory claims of prejudice were wholly unsupported by any facts.

Nor was the District Court, or the Ninth Circuit affirmance thereof, correct in premising its ruling on the claim that the mere potential unraveling of the then-proposed settlement warranted denying Irvine's motion. (RT, pp. 41-42; AER, pp. 488-489.)

In so ruling, the District Court and the Ninth Circuit obviously ignored the fact that any "prejudice" to be suffered by the settling parties was the product of their own desire to forge a settlement agreement which severely impeded and impinged upon the rights of an adjacent community which was not a party to the litigation.

To allow the settling defendants to base key portions of their agreement on terms and conditions affecting a third party such as Irvine, then allow the same to claim "prejudice" when that very party seeks to inject itself into the settlement process, is inherently inequitable.

In attempting to intervene, Irvine was merely seeking to protect its own interests and the interests of its citizens. Given the City of Irvine's legitimate interest in the proposed settlement, Irvine should have been afforded the opportunity to participate in the negotiation and discussion of said agreement on the same basis as the settling parties. (See generally, *United States v. State of Oregon, supra*, 745 F.2d at p. 553.)

Based on the foregoing, Irvine submits that it has adequately demonstrated that its motion to intervene was timely, and that the decisions of the District Court and the Ninth Circuit were erroneous and inequitable.

CONCLUSION

As shown above, there are special and important reasons for this Court to grant this Petition for Certiorari. The decision of the Ninth Circuit was erroneous and the timeliness test utilized by the Ninth Circuit is not in harmony with the test utilized by other circuits. For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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